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Damages for breach of a Keep-Open Clause: *Douglas Shelf Seven Ltd v Co-operative Wholesale Society Ltd*

In recent years the courts have been more used to considering the question of “keep-open” clauses in leases from the perspective of whether or not such clauses may be enforced by order of specific implement.¹ As it is less common to find detailed judicial consideration of the quantum of damages which may be claimed for breach of keep-open clauses, the decision of the Outer House in *Douglas Shelf Seven Ltd v Co-operative Wholesale Society Ltd and another*² is worthy of note. In a detailed judgment running to over six hundred paragraphs, Lord Reed makes some important observations on the assessment of damages in such cases, as well as on whether consent to a sub-lease constitutes delegation of the tenant’s duty to keep the premises open.

A. BACKGROUND

The facts of the case, briefly stated, were that the pursuers were the landlords of a shopping centre in Dundee, the defenders tenants of supermarket premises within the shopping centre under a sub-lease. The lease between the parties contained a typical keep-open clause.³ The defenders themselves had further sub-let the premises in 1993 to the third party in the action, originally Shoprite, subsequently Kwik Save. Kwik Save traded from the premises until 1995 when they threw up the lease, since which date the premises had lain vacant. The pursuers subsequently raised proceedings for damages for breach of contract against the defenders.⁴

The supermarket premises were typical anchor premises, in that they were intended by the pursuers to draw shoppers in to the shopping centre. As in previous keep-open litigation, the closure of the anchor premises was argued by the pursuers to have led to a loss of trade at other units in the centre, thereby reducing the letting value of such other units and making them more difficult to re-let when unit leases came up for renewal. All of this was argued to have led to a diminution in the capital value of the shopping centre, as well as a loss of rental income from the leases of the other units. In response, the defenders argued that the keep-open clause did not impose an obligation on them to keep the premises open, since the pursuers’ predecessors as

1 See *Retail Parks Investments Ltd v The Royal Bank of Scotland plc* (No 2) 1996 SC 227. See, for English law, *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

2 [2007] CSOH 53, 2007 GWD 9-167.

3 The defenders were obliged to “keep the premises open for retail trade during the usual hours of business in the locality ... the shop display windows being kept dressed in a suitable manner and in keeping with a good class shopping centre”. The sub-under-lease imposed the same obligation upon the third party.

4 The action was raised in 1999, then sisted from 2000 until 2004 until a complex proof before answer was held over 63 days from March 2005 to March 2006.

landlords had consented to the granting of the sub-lease to the third party, and that, in any event, the pursuers' losses had not been caused by any breach of the keep-open clause but by other factors, and also that any losses of the pursuers were much less than the amount claimed.

The primary interest of the case lies in what it says about the assessment of damages in cases where there is a long period of continuous breach by a contracting party, specifically a tenant. In undertaking this assessment, Lord Reed had to deal with difficulties of causation and remoteness as well as arguments relating to the point at which damages should be quantified. The causal and remoteness issues broke down into two questions. First, were the losses of the pursuers to be attributed, at least to some extent, to the defenders' breach of contract, or were they to be attributed wholly to extraneous factors? This question might in theory be considered either under the heading of causation or remoteness of damage. Second, given that there were a number of reasonable ways in which the defenders might have discharged their duty to keep the premises open for retail trade, which of these ways was the court to presuppose for the purposes of assessing the losses caused by the breach of contract?

B. CAUSATION AND REMOTENESS OF DAMAGE

In relation to the first question (of causation and remoteness of damage), the defenders argued that factors beyond their control had been the cause of the pursuers' losses, namely changes in the local area (such as the opening of competitor retail premises), design defects of the shopping centre, the poor location of the premises in relation to road networks, and general social and economic change. They also argued that improvements made to the centre by the pursuers in 1998 had been unreasonable and unforeseeable and had thus acted as a *novus actus interveniens*, breaking the chain of causation between any breach of contract and the losses suffered. Although this latter argument was held procedurally inadmissible,⁵ Lord Reed considered the other arguments relating to possible alternative reasons for the losses. He noted that there might be different ways of characterising such arguments:⁶

Counsel for the pursuers addressed these matters under the rubric of remoteness; and I am content to do the same. There are often different possible ways of rationalising restrictions on liability: lines can be drawn in terms of the scope of the obligation, or causation, or remoteness. The central problem is usually deciding where to draw the lines, rather than which conceptual route to follow.

It is quite true that there are a variety of approaches by which seemingly similar causal questions have been treated by courts. On the facts of *Douglas Shelf Seven*, there had been an initial event (the closure of the supermarket) to which causal questions could in theory have been addressed, but it was difficult to relate causally any specific capital or rental value losses either to that initial or to any later specific event. This made the usual judicial analysis of initial loss (judged according to causa-

5 Although Lord Reed does remark, *obiter* (para 597), of the defenders' arguments that "[i]n any event, however, the contention is not in my opinion established by the evidence".

6 Para 599.

tion proper) and further consequent or secondary loss (judged according to the rules on remoteness of damage) hard to apply. Given this difficulty, the decision by Lord Reed to subsume all broadly causal issues under the single heading of remoteness of damage does not seem unreasonable.

Applying recent authorities on remoteness in breach of contract such as *Jackson v Royal Bank of Scotland*,⁷ as well as the classic *Hadley v Baxendale*⁸ test, Lord Reed concluded that major social and economic changes which might, given the length of the lease, have had a substantial effect on the capital and income generating value of the premises would have been within the contemplation of the parties when the lease was made and were therefore factors of a type which were not too remote from the breach of contract to be relevant in assessing damages.⁹ They were thus properly to be treated as factors impacting on the losses suffered, although not to the exclusion of the factor for which the defenders were responsible, their breach of contract. Lord Reed's conclusion, weighing up all of the factors judged to have had an effect on the value of the centre at the date of the action, was that, as determination of the contribution made by the defenders' breach of contract to the overall losses suffered was a difficult exercise, it was appropriate "to assess damages on a broad basis".¹⁰ Given the complexity and uncertainty surrounding how the multiple causal factors had affected the pursuers' losses, Lord Reed's broad approach seems the best that any judge is likely to be able to do in such a case. No doubt this approach is frustrating for pursuers who, as in this case, seek to lead multiple expert witnesses over several weeks of oral pleading, but this merely serves to underline the dangers inherent in relying upon a damages claim for losses which flow from multiple causes, rather than in seeking specific implement.

In relation to the second causal issue raised by the case, Lord Reed had to imagine how the defenders might have behaved had they not broken the keep-open provision. Such a counterfactual enquiry is acutely prone to causal uncertainty, because the past hypothetical behaviour of parties is often unpredictable and, in theory, may have to be treated by courts as indeterminate.¹¹ This is especially likely to be so in cases where what is at issue is the past hypothetical behaviour of a defender faced with more than one alternative course of action each of which will discharge properly its contractual duties. Excusing defenders on account of such indeterminacy would lead to injustice, however, so it is not surprising that courts have considered themselves able to formulate rules to deal with such uncertainties. In this respect, Lord Reed referred to the English case of *Paula Lee Ltd v Robert Zeehil & Co Ltd*,¹² where just such a rule was formulated to deal with the uncertainty caused by a defendant who might have behaved in one of several reasonable ways in fulfilling its contractual duties. In

7 [2005] UKHL 3, (2005) 1 WLR 377.

8 (1854) 9 Exch 341.

9 Paras 600-601.

10 Para 607. On that basis, Lord Reed assessed the diminution in capital value at £450,000, and accrued revenue losses at £149,698.

11 See further on this point M Hogg, "The role of causation in delict" 2005 JR 89, especially at 122 f. Although this article concentrates mainly on causation in delict, what it says on past hypotheticals is equally applicable to breach of contract cases.

12 [1983] 2 All ER 390.

that case, Mustill J, discussing the nature of the duty imposed upon such a defendant, stated:¹³

A duty ... may often be construed as an obligation to act reasonably, and the damages will be assessed on the basis of what would have been reasonable... But what of the case where there is more than one reasonable method...? One possible view is that the court should try to forecast how the defendant would have performed but for the repudiation. In my opinion this approach is inconsistent with principle, since the defendant may in the event have done no more than was necessary to qualify as reasonable, and to assess damages on any other basis would be to penalise him for failing to do something which he was not obliged to do. The answer must, in my judgment, be that the court is to look at the range of reasonable methods, and select the one which is least unfavourable to the defendant, bearing in mind, of course, that in deciding what methods qualify as reasonable the question must be approached with the interests of both parties in mind.

Lord Reed was persuaded that the approach of Scots law to this difficulty was the same. In other words, he adopted a method of selecting, from the range of possible reasonable behaviour of the defenders, that behaviour which was least unfavourable to the defenders' position, even if it might not have been the behaviour most likely to have occurred absent breach (because, for instance, the defenders might have chosen to perform at a standard other than the minimum required). While causal theorists might argue about whether this is the causally proper approach, it has at least the merit of being an equitable approach to dealing with this type of causal uncertainty. Such approach did not, however, greatly assist the defenders, because Lord Reed believed that the pursuers had in any event not been arguing that the defenders should have traded as if they were "modelled on Harrods' Food Hall",¹⁴ but only that they were obliged to trade in a way appropriate for that part of Dundee in which the shopping centre was located. Had they acted in such a way, this would have attracted customers to the centre. Lord Reed thus accepted that failure to keep open the premises and trade in such a reasonable fashion was *a* cause (although not the only cause) of the losses claimed.

C. THE PROPER TIME FOR ASSESSING DAMAGES

Apart from such causal and remoteness questions, the second important issue which the case raises about the assessment of contractual damages is the moment at which it is appropriate to assess a pursuer's loss. The normal rule, in cases where breach of contract occurs at a single identifiable point in time, is that damages fall to be assessed at that point. This approach is not, however, so evidently appropriate to cases where a breach is ongoing. Lord Reed recognised this difficulty, and dismissed the argument that damages in such cases should be assessed at the single point when the breach first began as "unpersuasive".¹⁵ Instead the appropriate point of time against which to compare the position in which the pursuer might have been, absent the breach, was "the most recent date practicable, not... the date when the failure began".¹⁶

13 At 394.

14 Para 592.

15 Para 603.

16 Para 603.

In support of this view, Lord Reed referred to *Transworld Land Co Ltd v J Sainsbury plc*,¹⁷ in which the same approach had been adopted by Knox J. It might be added that Lord Reed's approach is consistent with that subsequently taken in the recent decision of the House of Lords in *Golden Strait Corporation v Nippon Yusen*,¹⁸ another case in which events occurring after breach but before the hearing of the case were considered properly to affect the assessment of damages.

This approach to the date for assessing damages raises further problems for landlords considering whether or not to choose the remedy of damages. If, following Lord Reed, damages may fall to be assessed at some point after the tenant's breach, in a landlords' market it may be best to claim damages immediately following that breach, for, if the market is subsequently saturated, a later claim may yield significantly less by way of damages. On the other hand, if the market subsequently dries up, a later claim may benefit the landlord. Predicting the future market is an activity fraught with difficulty, a difficulty which complicates further the landlord's choice between specific implement and damages.

D. SUBCONTRACTING: DELEGATION OF CONTRACTUAL DUTIES?

The final issue of note in the decision, albeit *obiter*,¹⁹ was the question of whether the grant of the sub-under-lease to the third party was to be seen as having released the defenders from their duty to occupy and keep open the premises. The defenders' argument was essentially that the granting of the sub-under-lease had amounted to a delegation (or a novation) of their keep-open duty, thus discharging the defenders from that duty. Unsurprisingly, Lord Reed was not sympathetic to this line of argument. In his view there was nothing in the facts before him to justify deviating from the normal contractual principle that, in sub-contracting, a contracting party is not released from the responsibility of performing its own duties. The fact that the pursuers' predecessors as landlords had consented to the sub-lease was of no relevance in this regard.²⁰ Lord Reed also cast doubt on comments by Lord Macfadyen in *Britel Fund Trustees Ltd v Scottish & Southern Energy plc*²¹ on the effect of a subtenancy on the tenant's duties. Lord Macfadyen had expressed the view that, where a subtenant was in occupation of premises, this would create an "an implied qualification of the express obligation [of the tenant] to occupy". In Lord Reed's view, it was preferable to say that, where occupation by a subtenant is permitted, that occupation is to be seen as if it were the occupation of the tenant: "*qui facit per alium facit per se*. A tenant's obligation to enter into and retain possession of the subjects does not necessarily (or ordinarily) require his personal occupation of them."²² This is surely the preferable analysis. The idea that subcontracting "qualifies" in some way the duty of the main contractor comes dangerously close to equating subcontracting with assignation.

17 [1990] 2 EGLR 255.

18 [2007] UKHL 12, [2007] 2 WLR 691.

19 Paras 559-576.

20 Paras 577-578.

21 2002 SLT 223.

22 Para 581.

E. CONCLUSION

Although *Douglas Shelf Seven Ltd* is only a decision of the Outer House, the lengthy consideration by Lord Reed of the issues raised is likely to mark it out as an influential decision. It serves as a warning, both to landlords and tenants. Landlords must undertake a difficult task in considering whether specific implement or damages is the preferable claim; tenants must appreciate that protracted breach on their part will not furnish an argument that the effects of such breach will necessarily be superseded by other causal factors.

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An Unsatisfactory Hire-Purchase

In *Lamarra v Capital Bank plc and Shields Automotive Ltd*,¹ the Inner House of the Court of Session, on appeal from the sheriff principal,² dealt with the issues of “satisfactory quality” and the remedies relating to it, in relation to a hire-purchase contract of a luxury motor vehicle. The relevant statutory provisions were sections 10(2)-10(2B) and 12A of the Supply of Goods (Implied Terms) Act 1973, which correspond to sections 14(2)-14(2B) and 15B of the Sale of Goods Act 1979. Hence, the *Lamarra* case not only speaks to the 1973 Act, but to the 1979 Act as well.

A. THE FACTS

The case involved a standard hire-purchase arrangement. There was an initial sale, by the original owner (Shields), of the goods (“a 4.6 litre Range Rover motor vehicle” described as “a new top-of-the-range-automatic model”) to a financier (Capital Bank), for £51,550. This was followed by Capital Bank, as the new owner, hiring the goods to a hirer (Lamarra), pursuant to a hire-purchase agreement dated 9 March 2001. The terms of repayment were that Lamarra was to pay a £6,717.82 deposit, with “36 monthly instalments”, comprising £1,422.80 per month, except for the first instalment which was £1,517.80. The Bank’s profit on the transaction was approximately £6,500. Although it is not referred to in the case, Lamarra would have had an option to purchase. After paying the deposit and the first two instalments, Lamarra ceased to make further payments. By letter of 30 March 2001, there was a purported rejection, owing to defects in the Range Rover. The vehicle was subsequently collected a little over two months later. At the time of its collection, the Range Rover had been driven for approximately 6,000 miles, which included some mileage after rejection, but it was held, by the sheriff, that this did not make the rejection invalid.³ This decision was not

1 [2006] CSIH 49, 2007 SC 95. The court, an Extra Division, comprised Lords Osborne, Phillip and Kirkwood. Lord Osborne delivered the court’s opinion.

2 2005 SLT (Sh Ct) 21. The sheriff principal was J C McInnes QC.

3 2007 SC 95 at para 5.